

"Ladies and Gentlemen, esteemed members of the committee, Good morning.

My name is David Parker, and I am here to speak on behalf of House Bill 546 at the request of Representative Pomnichowski.

By way of background, I am an assistant professor of political science at Montana State University. I teach American politics, and hold a doctorate in political science from the University of Wisconsin. I have published a book and two articles on congressional elections and Congress. I also worked on four campaigns during the 1995-1996 election cycle. Let me emphasize that I appear today as a private citizen of the state of Montana and the views I express are my own. My views do not reflect those of Montana State University, broadly conceived, or of the political science department.

HB 546 is an important piece of legislation because it aims to protect one of our most cherished political rights: the right to free speech. In particular, the Supreme Court has emphasized that political speech—above all else—receives the strictest protection from government interference. Any attempt by government to restrict speech must meet the test of strict scrutiny: in other words, government must not only show evidence of a compelling state interest to restrict that speech, but must also utilize narrowly tailored means in restricting that speech. Under this logic, the Supreme Court unanimously supported flag burning as free speech protected under the Constitution.

The bill before you today, however, has nothing to do with government restriction of free speech. It instead deals with the ability of home owners associations—commonly referred to as HOAs-- to restrict the political speech of home owners who are members of these associations.

I would like to make three general points demonstrating why this legislation is necessary. First, as subdivisions and condos increasingly become the preferred way to develop land, the constitutional rights of citizens are increasingly becoming circumscribed by covenants and bylaws these subdivisions develop. Second, these bylaws and covenants have the potential to form a majority tyranny and unduly suppress minority political speech. Third, there is no empirical evidence—to my knowledge—that restrictions on political signs have any positive effect on the property value of homes in associations with such restrictive covenants. I will now expound upon these points in turn.

In 2005, my wife and I moved to Granger, IN—a suburb of South Bend, IN. We purchased a home that was part of a home owners association but did not receive proper communication of that fact when we signed our closing documents. We were never presented with bylaws or covenants. It was not until after the fact, when we received notification of annual dues, that we knew we were in a subdivision and that the subdivision did indeed have bylaws restricting the placement of political signs. We were outraged, but there was nothing we could do. We had unwittingly signed away our constitutional rights to free political speech.

This brings up the obvious question: are such bylaws and covenants constitutional? The answer is generally yes. As I make clear to my students in American politics, the constitutional language

is plain that Congress shall make no law abridging the freedom of speech. Later court decisions have, through the process known as incorporating the 14th amendment, applied these same individual protections against government action to the citizens of the various states. Private associations, however, can plainly restrict the speech of its members. Indeed, one implies consent when purchasing the house: you are agreeing to abide by the rules of the subdivision.

Nevertheless, these bylaws and covenants are clearly deleterious to civic health. Individuals who are more active in elections: wearing buttons, displaying signs, and volunteering in campaigns are generally more civically minded, more efficacious politically, more trusting in government, and more politically informed. It is no surprise that higher voter turnout in the 19th century was the result, in part, of the widespread campaign pageantry and engagement that was part and parcel of the 19th century campaign. Voter turnout topped 80, even 85% of the vote, in part because of spectacular campaign. It is no surprise that as these forms of organization and civic engagement have diminished, so too has citizen interest and voter turnout.

Can the state of Montana restrict the operation of home owner associations in this regard? Recall after 9-11 the huge overpowering of civic pride and patriotism. Flags appeared everywhere: on cars, in front of homes, in windows, and the like. Some aggressive home owner associations in some states, however, tried to limit or outright ban the display of the American flag as a violation of subdivision bylaws and covenants. Both California and Florida passed laws prohibiting home owner associations from banning the display of the American flag. This proposed law is very much in the same spirit.

While the courts have protected the right of an association to restrict the placement of signs (and this was most recently affirmed by the NJ Supreme Court in 2007), there is a definite problem with allowing associations to do so. In Federalist #10, James Madison warned us of the problems of majority tyranny trampling the rights of the minority. In communities with a majority constituting a particular party or ideology, one might think that the potential to utilize the HOA restrictions by some to suppress alternative viewpoints is too good to pass up. In 2002, I was living in Madison, WI in a condo that my wife and I owned. I happened to place a sign in my window supporting a particular candidate for governor. Let's just say that this particular candidate was none-too-popular in Madison, and I soon found myself arguing with the condo association's judicial committee about my sign. I did remove the sign but made the point that the individual who brought me up on charges was a member of an organization very much opposed to this particular candidate, and I wondered whether I would have faced a fine from the association had I been supporting the preferred candidate of majority opinion in the city of Madison. The right of Republicans in Missoula to engage in debate and civic discourse must be protected as much as Democrats in Eastern Montana, and I fear that HOA bylaws and covenants are all too often used to suppress an unpopular political opinion. Finally, it is interesting that renters generally have more rights in this regard than owners of property subject to HOA bylaws and covenants.

The final point I would like to make is the nature of the bylaws and covenants in subdivisions. Generally, these bylaws and covenants are established to protect the collective home values of property owners in the association. It is firmly established that the color of homes, the upkeep of

yards, and the like not only affect the value of one home, but also affect the values of homes around them. Who wants to live next door to a slob who can't mow their lawn? The logic of protecting home owner value is often cited in support of these covenants restricting the placement of political signs. But to my knowledge, there is no empirical evidence indicating that allowing political signs detracts from the value of a home. At least, I have not seen the evidence and do not know of any studies that have attempted to uncover a relationship. Indeed, if covenants put in reasonable restrictions, such as signs can only be displayed in the 60 days prior to an election, this would remove any yard clutter for most of the year that might seem unseemly or unattractive to a potential buyer.

In the end, I urge you to vote on behalf of political expression and freedom. In the end, these covenants and restrictions on political speech are agreed to by home buyers not because they support them, but because of necessity. Subdivisions and condo associations provide affordable choices for families and individuals, and many times—in places like Bozeman, Belgrade, Missoula, or Billings—families have little choice but to purchase homes that are part of home owner associations because they are the most affordable option in fast growing communities. In short, many families sign away their constitutional rights because they have to, not because they want to. As Dr. Evan McKenzie, author of the book "Privatopia" put it in a New York Times op-ed piece 15 years ago, "Constitutional protections are meaningless if they do not apply in your own home, and when powerful private organizations act like governments, they should be treated as such. Otherwise, each development should be required to post a sign: "Warning: You are leaving the jurisdiction of the U.S. Constitution. Check your rights here, and take them with you when you leave."

To my fellow Republicans on the committee, I make a special plea. I am a lifelong Republican who ran Wyoming Senator Mike Enzi's campaign in 1996. This is a nonpartisan issue, and one that I urge you to support.

Replace the restrictions on speech with restrictions on gun rights and ask yourself how you would feel about the ability of an association to restrict individual rights. While I, too, am nervous about government intervention in many areas, I certainly believe that government has a necessary and positive role to play in protecting the individual rights of Montanans. If HOAs should not be allowed to restrict gun ownership, they should not be allowed to restrict political speech which receives the same constitutional protections and guarantees.

The Founders, above all else, hoped for a republic based upon lively and informed political discourse among the citizenry. Help restore individual speech rights and support HB 546."